LIBRARY
SUPREME COURT, U. S.

SUPREME COURT, U.S.
FILED
SEP 12 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 515

LOUIS KAYE,
Petitioner,

v.

CO-ORDINATING COMMITTEE ON DISCIPLINE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE NEW YORK COUNTY LAWYERS' ASSOCIATION, AND BRONX COUNTY BAR ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MORTON LIFTIN
818 - 18th Street, N.W.
Washington, D.C. 20006
Attorney for Petitioner

Washington, D. C. · THIEL PRESS · 202 · 393-0625

INDEX

OPINIONS BELOW 1
JURISDICTION 2
QUESTIONS PRESENTED 2
CONSTITUTIONAL PROVISIONS INVOLVED 3
STATEMENT OF THE CASE 3
A. Proceedings Before Committee 4
B. Proceedings in the Appellate Division 4
(1) Hearings Before Referee 5
(2) Order of the Appellate Division of January 13, 1966. . . 6
(3) Order of the Appellate Division of December 5, 1967. . . 6
Reasons for Granting the Writ 8
1. Privilege Against Self-Incrimination 9
2. Unreasonable Search and Seizure 13
3. Deprivation of Due Process 16
CONCLUSION 17
APPENDIX 18

TABLE OF CASES

Boyd v. United States, 116 U.S. 616 . . . . . 10, 11, 14
Bram v. United States, 168 U.S. 532 15
Burdeau v. McDowell, 256 U.S. 564, 576-477 15
Cohen v. Hurley, 366 U.S. 117 . . . . . 4, 11
Cummings v. Missouri, 4 Wall. 277, 327 11
Elkins v. United States, 364 U.S. 206 . . . . . 14, 16
Ex Parte Garland, 4 Wall. 333, 337 11
Gardner v. Broderick, 392 U.S. 273 12
Garrity v. New Jersey, 385 U.S. 493 . . . . . 10, 12
Griffin v. California, 380 U.S. 609, 614 13
In Re Ruffalo, 390 U.S. 544 . . . . . 11, 17

Kaye v. Co-ordinating Committee, 386 U.S. 17 ..... 3, 8

Knoll Associates, Inc. v. Federal Trade Commission, 396 F.2d ___ (1968 Trade Cases 72, 494, C.A. 7, decided June 18, 1968 ..... 15, 16

Lees v. United States, 150 U.S. 476 ..... 10, 11

Mapp v. Ohio, 367 U.S. 643 ..... 14, 15, 16

Malloy v. Hogan, 378 U.S. at 8 13

McNabb v. United States, 318 U.S. 332, 345 15

Olmstead v. United States, 277 U.S. 438 (1928) 15

Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 701 ..... 10, 11

Raley v. Ohio, 360 U.S. 423 17

Rochin v. California, 342 U.S. 165 17

Rogers v. Richmond, 365 U.S. 534 17

See v. City of Seattle, 387 U.S. 541 16

Spevack v. Klein, 385 U.S. 511 ..... 3, 6, 7, 11, 12, 14

Ullman v. United States, 350 U.S. 422, 431 10

Uniformed Sanitation Men v. Commissioner of Sanitation, 392 U.S. 280 12

United States v. Brown, 381 U.S. 437 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

LOUIS KAYE,
Petitioner,

v.

CO-ORDINATING COMMITTEE ON DISCIPLINE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE NEW YORK COUNTY LAWYERS' ASSOCIATION, AND BRONX COUNTY BAR ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered on June 14, 1968, affirming the order of the Appellate Division, First Department, of the Supreme Court of the State of New York, dated December 5, 1967, disbarring petitioner from practice as an attorney and counselor-at-law.

OPINIONS BELOW

The Court of Appeals wrote no opinion. The opinion of the Appellate Division is reported at 29 A.D. 2d 20, 284 N.Y.S. 2d 921.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). The judgment of the Court of Appeals was entered on June 14, 1968.

QUESTIONS PRESENTED

1. Whether the Fifth Amendment requires the suppression in a disbarment proceeding of self-incriminating evidence obtained under the compulsion of a subpoena and the threat of disbarment for noncompliance with the subpoena.

2. Whether the Fifth Amendment permits a legal presumption of guilt to be drawn in a disbarment proceeding from the attorney's failure to testify.

3. Whether the Fourth Amendment prohibits the use in a disbarment proceeding of evidence contained in the attorney's testimony and private papers, or the fruits thereof, obtained from the attorney by an unconstitutional threat of disbarment if he refused to provide the testimony and furnish the private papers.

4. Whether the Fourth Amendment prohibits the use in a disbarment proceeding of evidence obtained by an investigating committee from an attorney's private papers which, after having been stolen, were submitted to the investigating committee.

5. Whether the cumulative effect in a disbarment proceeding of a complaint grounded in extortion, an investigation based upon stolen private papers, the use of self-incriminating evidence obtained under the compulsion of a subpoena and threat of disbarment, and the legal presumption of guilt because of the failure to testify represents such a departure from accepted standards of fairness as to constitute a deprivation of due process under the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . .

United States Constitution, Amendment V

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

United States Constitution, Amendment XIV

> Section 1 . . . nor shall any State deprive any person of life, liberty or property without due process of law; . . .

STATEMENT OF CASE

The Co-ordinating Committee on Discipline of the Association of the Bar of the City of New York, the New York County Lawyers' Association and the Bronx County Bar Association (hereinafter "the Co-ordinating Committee") was authorized on May 11, 1964, by the Appellate Division, First Department, to institute and prosecute a disbarment proceeding against petitioner. After receiving the Referee's report the Appellate Division, on January 13, 1966, ordered petitioner disbarred effective February 14, 1966. On February 13, 1967, this Court granted a petition for a writ of certiorari to review the Appellate Division's disbarment order, vacated the judgment of the Appellate Division, and remanded the case for reconsideration in the light of *Spevack v. Klein*, 385 U.S. 511. *Kaye v. Co-ordinating Committee*, 386 U.S. 17. On remand to the Appellate Division the Co-ordinating Committee moved for an order sustaining all but one of the charges of professional misconduct previously alleged. Petitioner cross-moved for an order of re-reference to hear the matter *de novo* and for other relief. By order dated December 5, 1967, the Appellate Division denied petitioner's motion for

a *de novo* hearing, sustained virtually all the charges, confirmed the Referee's report, and ordered petitioner disbarred effective January 5, 1968. On June 14, 1968, the Court of Appeals affirmed the Appellate Division's order of December 5, 1967.

A. *Proceedings Before Committee.* The complaint which precipitated the investigation by the Co-ordinating Committee was made by an attorney named Gelman who was formerly in petitioner's employ. Petitioner advised the Co-ordinating Committee that the complaint was made only after petitioner's refusal to submit to attempted extortion. Gelman had obtained some of petitioner's records and threatened to have him disbarred by their disclosure unless petitioner met his demand for the payment of money. These records were taken by Gelman from petitioner's private papers without his knowledge or permission. They were not presented at the time Gelman made his complaint or was first interviewed but were subsequently turned over upon the request of the Co-ordinating Committee and were used as the basis for obtaining testimony and evidence in the subsequent investigation.

In the course of this investigation, a subpoena was issued which directed petitioner to appear before the Co-ordinating Committee to testify and to produce certain books and records. Counsel to the Co-ordinating Committee informed petitioner that, in accordance with the practice upheld in *Cohen v. Hurley*, 366 U.S. 117, an additional charge independently sustaining disbarment would be filed if he failed to respond to the subpoena. Yielding to the compulsion of the subpoena and the threat of disbarment, petitioner produced the books and records demanded and testified in the secret investigation by the Co-ordinating Committee's recommendation and the Disbarment proceeding followed.

B. *Proceedings in the Appellate Division.* On July 7, 1964, the Appellate Division appointed a referee to take testimony and report with respect to the Co-ordinating

Committee's charges. Petitioner's answer denied the charges and asserted an unlawful search and seizure of his private papers and a violation of his privilege against self-incrimination under the Federal Constitution. Thereafter, claiming the protection of the Fourth, Fifth and Fourteenth Amendments, petitioner moved before the Appellate Division for an order suppressing the use before the Referee of the evidence obtained by the Co-ordinating Committee. This motion was denied on October 29, 1964.

(1) *Hearings Before Referee.* At the hearing before the Referee, testimony of petitioner in the Co-ordinating Committee's investigation was offered in evidence and received over petitioner's objection that its use in the disbarment proceeding would violate the self-incrimination prohibition of the Fifth Amendment as applied to state proceedings under the Fourteenth Amendment. Testimony before the Co-ordinating Committee offered by petitioner was excluded.

The Referee's report, dated July 23, 1965, stated that the investigation of petitioner was instituted as a result of a complaint which "evidently stemmed from the desire of Gelman to cause trouble to the respondent [petitioner] because of certain personal grievances" and that, in the course of the investigation, Gelman submitted to the Co-ordinating Committee a number of documents which he claimed had been discarded by petitioner. Petitioner claimed these were among the private papers which were stolen from his files. The Referee made no findings with respect to how these private papers were obtained and did not pass upon petitioner's constitutional objections stating that they had previously been rejected by the Appellate Division and this established the law of the case.

The report twice commented on the fact that petitioner "chose not to testify in this proceeding" and stated that his testimony before the Co-ordinating Committee "contains various admissions." This testimony, as well as petitioner's failure to volunteer explanations of certain testimony and

charges, was set forth in the Referee's report and relied upon to support his findings that eight charges had been proved.

(2) *Order of the Appellate Division of January 13, 1966.* After the Referee's report had been filed, petitioner filed a motion in the Appellate Division to remand the proceeding to the Referee for the purpose of receiving in evidence all petitioner's testimony before the Co-ordinating Committee and allowing the filing of a supplemental brief based upon this additional evidence or, alternatively, to incorporate such testimony in the record before the Appellate Division for consideration in its ruling with respect to the Referee's report and to permit supplemental briefs to be filed based upon such additional testimony. On January 13, 1966, the Appellate Division denied this motion, found petitioner had been guilty of professional misconduct and ordered that he be disbarred effective February 14, 1966.

The Appellate Division's opinion noted that petitioner did not testify at the hearings before the Referee, quoted from an earlier opinion that "disciplinary proceedings are not criminal proceedings," referred to the "legal presumption" of the truth of adverse testimony resulting from "the failure of an attorney to testify in a disciplinary proceeding," and commented on petitioner's "obligations to take the stand and be cross-examined as to any testimony he might give in attempted explanation of his conduct."

(3) *Order of the Appellate Division of December 5, 1967.* On the remand of the case after this Court vacated for reconsideration the order of January 13, 1966, the Co-ordinating Committee filed a motion in the Appellate Division for an order sustaining, with one minor exception, each of the charges previously sustained against petitioner. In a brief accompanying the motion, the Co-ordinating Committee asserted that it was not relying upon the Referee's report because that report was based upon petitioner's "own testimony to an extent which might be deemed inconsistent with the principles enunciated in *Spevack.*"

The brief recited that the Co-ordinating Committee's motion was "predicated solely upon the independent evidence in the record which may properly be considered by the Court." Petitioner filed a cross-motion praying, inter alia, for a new reference to obtain a rehearing of the matter *de novo*. By its order of December 5, 1967, the Appellate Division, "having reconsidered the matter in the light of *Spevack v. Klein;* and upon such reconsideration," ordered that the motion of the Co-ordinating Committee be granted to the extent of sustaining the charges, that the report of the Referee filed July 27, 1965, be confirmed with respect to the charges sustained, that petitioner's cross-motion be denied in all respects, and that petitioner be disbarred from practice as an attorney and counselor at law in the State of New York effective January 5, 1968.

In an opinion accompanying its order, the Appellate Division stated that the "motion and cross motion constitute a proper hearing on notice and on the filed papers." The only language in the opinion pertinent to reconsideration in the light of *Spevack v. Klein* is the following paragraph:

> Examination of the record reveals that there is sufficient without respondent's testimony to sustain charges 1,2,3 as modified by eliminating the Finegold specification, 4, 5,6,8, and 9. As to such charges the constitutional prohibitions or limitations have no controlling application.

The opinion does not disclose that the Court directed its attention to the problem of eliminating from its consideration documentary evidence which petitioner was required to produce, testimony or other evidence obtained from leads provided by the testimony and records coerced from petitioner, the Referee's findings based on inferences drawn from petitioner's failure to testify, the adverse legal presumption to which the Appellate Division referred in its earlier opinion because of petitioner's failure to testify, or the evidence obtained from or as a result of petitioner's

private papers which were stolen by a former associate and obtained on request by the Co-ordinating Committee.

On June 14, 1968, the Court of Appeals affirmed the decision of the Appellate Division. On July 2, 1968, the Court of Appeals granted petitioner's motion to amend the remittitur by adding thereto that upon appeal "there were presented and necessarily passed upon questions under the Constitution of the United States" in that petitioner contended that his disbarment resulted from a violation of "his constitutional right against unreasonable search and seizure and his right to privacy," "his constitutional privilege against self-incrimination," "his constitutional right to be confronted by the witnesses against him," and "his right to procedural due process of law." The amended remittitur recited that the Court of Appeals held there was no violation of any of petitioner's constitutional rights.

REASONS FOR GRANTING THE WRIT

The proceedings below (a) denied petitioner the protection of the privilege against self-incrimination guaranteed by the Fifth Amendment as applied to the states through the Fourteenth Amendment, (b) violated the unreasonable search and seizure prohibition of the Fourth Amendment as applied to the states through the Fourteenth Amendment, and (c) departed from fundamental concepts of fairness to such a degree as to constitute a deprivation of due process under the Fourteenth Amendment. These are the same grounds urged in the petition for a writ of certiorari to review the disbarment order of January 13, 1966, which was vacated by this Court on February 13, 1967. *Kaye v. Co-ordinating Committee,* 386 U.S. 17. The perfunctory "reconsideration" by the Appellate Division of its prior order in connection with the claimed violation of the self-incrimination privilege renders the new order, based on the same investigation, hearings, Referee's report, and Appellate Division review, subject to the same constitutional infirmities on this ground presented in the prior petition. The

unreasonable search and fundamental fairness grounds for certiorari have not been passed upon.

1. *Privilege Against Self-Incrimination.* The claim of a denial of the privilege against self-incrimination has two facets: (1) the compulsory production and evidentiary use of self-incriminating evidence and (2) the penalty imposed upon petitioner because of his failure of offer himself as a witness in the hearings before the Referee. The claimed violation of the privilege with respect to the compulsory production and evidentiary use of self-incriminating evidence rests on the contention that the disbarment of an attorney from the practice of law is the equivalent of a criminal penalty and, therefore, within the protection of the privilege. Accordingly, the use in the disciplinary proceeding of incriminating evidence compelled by threat of disbarment constituted an invasion of the privilege.

Although the Appellate Division purported to find the charges against petitioner sustained without reliance upon petitioner's testimony, this bare statement is hardly sufficient to remove the taint of the coerced evidence which permeated both the Referee's and the Appellate Division's consideration of the entire proceeding. In stating "that there is sufficient without respondent's [petitioner's] testimony to sustain" the charges, the Court did not even advert to the records which petitioner was compelled to produce or the evidence which was obtained as a result of that coerced from petitioner. Neither did it deal with the adverse inferences previously drawn by the Referee and the Appellate Division by virtue of petitioner's silence before the Referee. The investigation of the Co-ordinating Committee proceeded from petitioner's compelled evidence. This evidence was introduced in the hearings before the Referee, and, as acknowledged by the Co-ordinating Committee, was relied on in the Referee's report which the Appellate Division in its current order confirmed notwithstanding this admitted reliance. The Appellate Division's denial of a new hearing to petitioner made it impossible to

purge from the proceedings below the taint of the compelled testimony and adverse inferences. Mere exclusion from consideration, even if this were possible, of petitioner's own testimony is only the beginning of the process. For this reason the "reconsideration" by the Appellate Division does not eliminate from the case petitioner's claimed violation of his privilege against self-incrimination.

If disbarment is a criminal penalty, the Fifth Amendment precludes the use of coerced testimony in the disciplinary proceeding. The compulsion of incriminating testimony generates an immunity from sanctions which are "criminal in nature" (*Ullmann v. United States*, 350 U.S. 422, 431) whether or not the immunity is contemplated when the testimony is compelled. *Garrity v. New Jersey*, 385 U.S. 493. Consequently, after petitioner invoked his privilege against self-incrimination, compelling him to testify under threat of disbarment barred the use of this testimony in any proceeding which might result in the imposition of a penalty of a criminal nature. In *Ullmann v. United States, supra*, where the constitutionality of an immunity statute was assailed on the ground that the testimony compelled might result in disqualification from federal employment and other disabilities, the Court stated that a witness who is compelled to answer under the protection of immunity "has, of course, when a particular sanction is so sought to be imposed against him, the right to claim that it is criminal in nature." 350 U.S. at 431. The use of compelled testimony in the present case, therefore, squarely poses the question whether a disciplinary proceeding is a "criminal case" within the meaning of the Fifth Amendment's prohibition against compelled, self-incriminating testimony.

There is formidable authority in the decisions of this Court for the view that, for self-incrimination purposes, a disciplinary proceeding is criminal in nature. *Boyd v. United States*, 116 U.S. 616; *Lees v. United States*, 150 U.S. 476; cf. *Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 701. Certainly, the loss of one's right to practice his

profession is no less a criminal penalty than the forfeiture of property involved in the *Boyd* case. The continued vitality of the *Boyd* case was underscored by the reaffirmation in *Spevack v. Klein* "of the broad protection given the privilege" in *Boyd v. United States, supra.* In *Boyd* "compulsory production of books and papers of the owner of goods sought to be forfeited was held to be compelling him to be a witness against himself" (385 U.S. at 515). The *Lees* and *Plymouth Sedan* cases also involved property forfeitures. The dissenting opinions in *Cohen v. Hurley,* 366 U.S. 117, overruled in *Spevack v. Klein,* 385 U.S. 511, expounded the views that the effects of disbarment were so severe as to entitle a lawyer to "the full benefit of the 'law of the land'" (366 U.S. at 147) and that "taking away a man's right to practice law is imposing a penalty as severe as a criminal sanction" (366 U.S. at 153-154).

Denial of the right to engage in the practice of law or in other occupations has been held similar to a criminal penalty for the purpose of other constitutional provisions. An attorney has been held "entitled to procedural due process, which includes fair notice of the charge" in disciplinary proceedings because they "are proceedings of a quasi-criminal nature" and disqualification from practice "is a punishment or penalty imposed on the lawyer." *In Re Ruffalo,* 390 U.S. 544. Disqualification from the practice of law, as well as the pursuit of other vocations, has been regarded as punishment for purposes of the Constitution's bill of attainder and ex post facto prohibitions. *Ex parte Garland,* 4 Wall. 333, 377 (legislative denial of an attorney's right to practice "for past conduct can be regarded in no other light than as punishment for such conduct"); *Cummings v. Missouri,* 4 Wall. 277, 327 ("This deprivation [of right to pursue regular avocations] is punishment"); *United States v. Brown,* 381 U.S. 437 (disqualification from holding union office held punishment). No reason is readily apparent why disqualification from practicing law, which has been regarded as a criminal penalty for the purpose of other constitutional safeguards, should not simi-

larly be regarded as criminal punishment for purposes of the privilege against self-incrimination. The question whether disciplinary action against attorneys is within the protection of the privilege, therefore, warrants review by this Court.

The importance of determining whether a disciplinary proceeding is a criminal case for purposes of the privilege is accentuated by the interpretation of the Court's recent decisions in *Uniformed Sanitation Men v. Commissioner of Sanitation*, 392 U.S. 280 and *Gardner v. Broderick*, 392 U.S. 273, as indicating that attorneys may be compelled, absent the possibility of criminal prosecution, to provide information that may lead to their disqualification from practice. The opinion of the Court by Mr. Justice Fortas in the *Gardner* case acknowledged (p. 278) that if "a policeman had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity v. New Jersey, supra*, the privilege against self-incrimination would not have been a bar to his dismissal." Mr. Justice Harlan, however, apparently derives from this the conclusion that an attorney similarly may be disbarred, notwithstanding the decision in *Spevack v. Klein, supra*, for refusing to answer questions concerning the practice of his profession. In a concurring opinion, joined by Mr. Justice Stewart, he finds in the *Gardner and Uniformed Sanitation cases* "a procedural formula whereby" lawyers may be "disciplined for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices" (392 U.S. at 285). Obviously, if lawyers may be punished for refusing to disclose information that may lead to disciplinary action, such punishment is not within the protection of the privilege. Mr. Justice Fortas, however, expressly differentiated the situation of a public official from that of a lawyer, thereby suggesting that, even absent the possibility of criminal prosecution, the lawyer may not be disciplined for re-

fusing to provide information concerning his law practice presumably because disciplinary proceedings are within the scope of the privilege. The desirability of a dispositive decision of this Court to resolve any doubt on the important constitutional question whether the privilege applies to the penalty of disqualification from the practice of law seems apparent.

Whether or not disbarment is within the scope of the privilege, the adverse presumption drawn by the Appellate Division in its original decision from petitioner's failure to testify before the Referee imposed an impermissible penalty on the exercise of the privilege and, standing alone, also constituted an unconstitutional denial of its protection. The Appellate Division did not address itself to this matter on "reconsideration" and there is no basis for assuming that its effect has been dissipated. In *Malloy v. Hogan*, 378 U.S. at 8, the Court made clear that application of the Fifth Amendment standards to the Fourteenth Amendment precluded the States from penalizing the exercise of "the right of a person to remain silent." Thus, the Court held in *Griffin v. California*, 380 U.S. 609, 614, that adverse comment by a court or prosecutor upon the refusal to testify is repugnant to the Fifth Amendment, since "[i]t is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." Drawing an adverse conclusion from petitioner's failure to testify is patently a greater penalty than the adverse comments to the jury condemned in *Griffin v. California*. Although the Appellate Division's current opinion recites that it disregarded all petitioner's testimony, nothing in the opinion even suggests that it abandoned the unfavorable inference previously drawn from petitioner's failure to testify.

(2) *Unreasonable Search and Seizure.* The compulsory production of petitioner's testimony and private papers under an unconstitutional threat of disbarment and the Coordinating Committee's request for petitioner's stolen pri-

vate papers constituted unreasonable searches under the Fourth Amendment.

A. *Spevack v. Klein, supra,* decided that a lawyer cannot be disbarred because of his refusal to testify at a disciplinary investigation in reliance on the privilege against self-incrimination. Petitioner, however, under threat of disbarment in violation of his constitutional rights, was compelled to forego the privilege and supply inculpatory records and information. The fruits of this unconstitutional compulsion were introduced as evidence in the disciplinary proceeding. *Boyd v. United States, supra,* held that "a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment" (115 U.S. at 622). Coerced production for disciplinary purposes would appear similarly to be within its scope.

B. In view of *Mapp v. Ohio,* the decision in *Elkins v. United States,* 364 U.S. 206, suggests that the guarantees of the Fourth Amendment were disregarded also in the evidentiary use against petitioner of his private papers stolen by Gelman which were produced at the request of the Co-ordinating Committee. *Elkins v. United States* discarded the so-called "silver platter" doctrine pursuant to which records illegally obtained by state officials could be turned over to federal officials and used as evidence in a federal prosecution. The Court held that evidence obtained by state officers during a search that would have been illegal under the Fourth Amendment if conducted by federal officials was inadmissible in federal proceedings. The controlling factor was the illegal method by which the evidence was obtained rather than the status of the official who illegally obtained it.

The *Elkins* holding that the illegal state action contaminated the evidence even for federal proceedings is not, of course, a holding that all illegally obtained private papers are barred by the Fourth Amendment from incriminating use against their rightful owner. It appears, however, to be

a large step in the direction of the dissent by Mr. Justice Brandeis, concurred in by Mr. Justice Holmes, in *Burdeau v. McDowell*, 256 U.S. 465, 476-477, which condemned the evidentiary use of papers stolen by a private individual and turned over to federal officials, stating "Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play." See also dissenting opinions of Mr. Justice Holmes and Mr. Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438 (1928).

Arguably, the use as evidence by state officers of stolen papers constitutes state collaboration in illegal conduct and, therefore, unconstitutonal state action. Cf. *Bram v. United States*, 168 U.S. 532. In the present case, however, the State's involvement is much clearer since the stolen papers were not voluntarily submitted but were requested by the Co-ordinating Committee when advised of their existence. The Co-ordinating Committee thus participated in obtaining the papers for use in connection with its own investigation and the subsequent proceedings. The use in the proceedings of these stolen papers or the fruits of their disclosures cannot be upheld "without making the courts themselves accomplices in willful disobedience of law." *McNabb v. United States*, 318 U.S. 332, 345.

This view has recently been adopted by the Court of Appeals for the Seventh Circuit in a case involving the evidentiary use of stolen documents. The court held the Federal Trade Commission's knowing acceptance and use in a price discrimination proceeding of private papers stolen by an employee for the purpose of aiding the Commission's counsel to be equivalent to an unreasonable search and seizure violative of the Fourth Amendment. *Knoll Associates, Inc. v. Federal Trade Commission*, 396 F.2d ___ (1968 Trade Cases 72,494, C.A. 7, decided June 18, 1968).

C. The exclusionary rule with respect to evidence obtained by an unreasonable search was held applicable to state proceedings in *Mapp v. Ohio*, 367 U.S. 643. The Fourth

Amendment has been held applicable to administrative investigations (see, e.g. *See v. City of Seattle*, 387 U.S. 541) and the policy of the exclusionary rule to discourage violation of the constitutional protection would seem to preclude the State's use of evidence obtained in violation of the Fourth Amendment in a civil or quasi-criminal, as well as a criminal, proceeding. See *Mapp v. Ohio, supra; Elkins v. United States, supra.* Evidence tainted by an unreasonable search has been held by a Court of Appeals inadmissible in an administrative proceeding which resulted in a cease and desist order. *Knoll Associates, Inc. v. Federal Trade Commission*, 396 F.2d___(1968 Trade Cases 72,494, C.A. 7, decided June 18, 1968). The same policy should preclude use in disciplinary proceedings of the product of the constitutional invasion to the detriment of the person whose constitutional privilege was violated. The present case thus presents questions of important constitutional dimensions under the Fourth, as well as the Fifth Amendment.

3. *Deprivation of Due Process.* Whether or not the self-incrimination and unlawful search and seizure prohibitions of the Fourth and Fifth Amendments have been violated, the proceedings which culminated in the disbarment order departed so radically from concepts of fundamental fairness as to constitute a violation of the more generalized due process clause of the Fourteenth Amendment.

The factors which infect the disbarment proceedings are their malicious inception in the refusal of petitioner to yield to attempted extortion, the Co-ordinating Committee's solicitation from Gelman of the production of petitioner's stolen private papers, the secret investigation predicated upon Gelman's malevolent complaint and the stolen papers, the service of a subpoena upon petitioner directing him to produce incriminating evidence for his own disbarment under threat of disbarment for failure to comply, the filing of charges on the basis of an investigation so commenced and evidence so obtained, the use of the prejudicial evidence so obtained from petitioner in the hearings on

the charges, the adverse conclusions drawn by the Referee and by the Appellate Division from petitioner's failure to testify in the hearings before the Referee, and the perfunctory reconsideration by the Appellate Division on remand without a hearing which would permit complete eradication of the contamination of the prior proceedings.

This extraordinary combination of circumstances constituted a denial of due process. Although all-encompassing standards of due process under the Fourteenth Amendment have not been precisely defined, conduct which is unduly offensive to the sense of fairness inherent in our traditional concepts of liberty and respect for individual rights or which shocks the common understanding of decency and fair play does not satisfy its requirements. The standards of procedural due process in a disbarment proceeding approach those applied in cases of a criminal nature. *In re Ruffalo, supra.* From its sordid inception in frustrated extortion to its culmination in penalizing petitioner both from words out of his own mouth and for his not having spoken, the disbarment proceeding violated the fundamental fairness standard of the due process clause of the Fourteenth Amendment. Cf. *Rochin v. California,* 312 U.S. 165; *Rogers v. Richmond,* 365 U.S. 534; *Raley v. Ohio,* 360 U.S. 423.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Morton Liftin
818 - 18th Street, N.W.
Washington, D.C. 20006
Attorney for Petitioner

Appendix

OPINION OF APPELLATE DIVISION
(December 5, 1967)

PER CURIAM.

Respondent Louis Kaye was disbarred by this Court in 1966 (Matter of Kaye, 24 A.D.2d 345, 266 N.Y.S.2d 69, lv. to appeal denied, 17 N.Y.2d 422, 268 N.Y.S.2d 1028, 216 N.E.2d 32, 17 N.Y.s2d 731). The Supreme Court of the United States granted certiorari, vacated the judgment and on February 13, 1967 "remanded [the matter] to the Appellate Division of the Supreme Court of New York, First Judicial Department, for reconsideration in light of Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 636, 17 L.Ed.2d 574" (Kaye v. Co-Ordinating Committee on Discipline of the Association of the Bar of the City of New York, 386 U.S. 17, 87 S.Ct. 848, 17 L.Ed.2d 698).

The petitioner, the Coordinating Committee on Discipline now again, on notice, moves for an order sustaining each of the charges of professional misconduct which were lodged against the respondent, excepting only that portion on charge 3 which relates to the Finegold specification. There were nine charges involving (1) farming out of negligence cases on which respondent was contingently retained, under arrangements whereby respondent obtained loans to be repaid out of respondent's expected share of the fees without regard to services rendered by respondent; (2) conversion for more than a year of a client's funds of moneys to be paid to a doctor; (3) failure to remit settlement funds to personal injury claimants within the time required by the Rules of the Court; (4) compromise of infants claims without court order; (5) failure to file statements of retainer; (6) failure to file closing statements; (7) failure to maintain a special account for deposit of settlement funds; (8) harboring a disbarred lawyer in respondent's law office; and (9) the use of profanity and the addressing

of a racial epithet to a witness at the close of an action in the Supreme Court (see Matter of Kaye, 24 A.D.2d 345, 347, 266 N.Y.S.2d 69, 70).

The respondent in this proceeding cross-moves for various relief including an order of re-reference to hear the matter de novo, a remand for reconsideration of the denial of a motion by respondent to suppress certain evidence, reconsideration of a denial of a motion for discovery and inspection and disaffirmance of the referee's report previously affirmed by this Court.

The motion and cross-motion constitute a proper hearing on notice and on the filed papers.

The motion of the Coordinating Committee is granted as herein indicated and the cross-motion of respondent is denied.

Examination of the record reveals that there is sufficient without respondent's testimony to sustain charges 1,2,3 as modified by eliminating the Finegold specification, 4,5,6,8 and 9. As to such charges the constitutional prohibitions or limitations have no controlling application.

Significant is the following statement concerning respondent in Matter of Kaye, 24 A.D.2d 345, at 350, 266 N.Y.S.2d 69, at 73, supra:

> "In determining the measure of disciplinary sanction to be metered out, we have, of necessity, considered respondent's past disciplinary record. Respondent was admitted to the Bar by the Appellate Division, Second Department, on May 7, 1924. In January, 1928, respondent was disbarred by the Second Department, after he had pleaded guilty to a felony count in an indictment in the United States District Court for the Eastern District of New York charging him with using the mails to defraud casualty companies into paying money to fraudulent claimants for alleged personal injuries (Matter of Kaye, 222 App.Div. 829, 226 N.Y.S. 391). In June, 1935, respondent was reinstated by the Second Department, after he had received a Presiden-

tial pardon. (Matter of Kaye, 243 App.Div. 615, 277 N.Y.S. 636).

"In April, 1953, this court suspended respondent from practice for one year on a charge of knowlingly issuing bad checks (Matter of Kaye, 281 App.Div. 508, 509, 120 N.Y.S.2d 822, 823). Our *Per Curiam* in that case noted that: 'Respondent has previously been admonished with respect to his conduct and professional associations. He appears not to have taken the admonition sufficiently seriously.' Respondent was reinstated by this court on September 1, 1954.

"Despite these prior difficulties, respondent has evidently continued to violate the rules of correct professional conduct in grave respects. His conduct strongly suggests the likelihood that he will continue to bring the profession into disrepute."

Accordingly the report of the referee is again confirmed with respect to the charges enumerated above. Respondent is disbarred.

Respondent disbarred effective January 5, 1968. Cross-motion of respondent denied in all respects. All concur.

DISBARMENT ORDER OF APPELLATE DIVISION
(December 5, 1967)

An order of this Court having been made and entered on the 13th day of January, 1966, as amended by order of this Court entered on the 19th day of April, 1966, disbarring respondent from practice as an attorney and counselor-at-law in the State of New York

And thereafter, and on June 30, 1966, the Supreme Court of the United States having docketed a petition for a writ of certiorari; and thereafter, and on February 13, 1967, having granted certiorari and having vacated the order of this Court entered on January 13, 1966, as amended by order entered on April 19, 1966, and having remanded the

matter to this Court for reconsideration in the light of *Spevack v. Klein,* 385 U.S. 511,

And thereafter, and on April 3, 1967, this Court having entered an order making the mandate and judgment of the United States Supreme Court the order of this Court, and having ordered The Co-ordinating Committee on Discipline to pay to respondent herein the sum of $100 as costs,

And petitioner, The Co-ordinating Committee on Discipline, having moved this Court for an order sustaining each of the charges of professional misconduct set forth in the petition with the exception of the Robert and Lillian Finegold specification of Charge No. 3; and the respondent having cross-moved this Court for an order of re-reference to hear the matter de novo, reconsideration of the denial of a motion by respondent to suppress certain evidence, reconsideration of a denial of a motion for discovery and inspection, disaffirmance of the Referee's report previously confirmed by this Court; and for other relief,

Now, upon reading and filing the notice of motion, dated April 27, 1967, with proof of due service thereof, the affidavit of Angelo T. Cometa, sworn to the 17th day of May, 1967, the cross-notice of motion, dated May 12, 1967, with proof of due service thereof, and the affidavit of Louis Kaye, sworn to the 22nd day of May, 1967; and after hearing Mr. Angelo T. Cometa for the motion and in opposition to the cross-motion, and Mr. Louis Kaye, respondent pro se, for the cross-motion and in opposition to the motion of petitioner; and due deliberation having been had thereon, it is unanimously

Ordered that the motion and cross-motion constitute a proper hearing on notice and upon the filed papers and upon all of the proceedings heretofore had herein, and the Court having reconsidered the matter in the light of *Spevack v. Klein;* and upon such reconsideration, it is further unanimously

Ordered that the motion of The Co-ordinating Committee on Discipline is granted to the following extent: with

respect to the petition verified the 12th day of May, 1964, Charges No. 1, 2 and 3, as modified by eliminating the Finegold specification, are sustained; Charges No. 4, 5, 6, 8 and 9 are sustained and the report of Raphael P. Koenig, Esq., the Referee herein, filed in the office of the Clerk of this Court on the 27th day of July, 1965, be, and the same hereby is, confirmed with respect to the sustained charges enumerated above, and it is further unanimously

Ordered that the cross-motion of the respondent be, and the same hereby is, in all respects denied; and it is further unanimously

Ordered that the said Louis Kaye (admitted as Louis Kaminetsky) be and he hereby is disbarred from practice as an attorney and counselor-at-law in the State of New York effective January 5, 1968; and it is further unanimously

Ordered that the name of the said Louis Kaye (admitted as Louis Kaminetsky) be struck from the roll of attorneys and counselors-at-law in the State of New York effective January 5, 1968, and it is further unanimously

Ordered that the said Louis Kaye (admitted as Louis Kaminetsky) be and he hereby is commanded to desist and refrain from the practice of the law in any form, either as principal or agent, clerk or employee of another, effective January 5, 1968; and it is further unanimously

Ordered that the said Louis Kaye (admitted as Louis Kaminetsky) be and he hereby is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, effective January 5, 1968; and it is further unanimously

Ordered that the said Louis Kaye (admitted as Louis Kaminetsky) be and he hereby is forbidden to give to another an opinion as to the law or its application or any advice in relation thereto, effective January 5, 1968.

Judgment of Court of Appeals
(June 14, 1968)

MTR OF KAYE ORDER AFFIRMED WITHOUT COSTS NO OPINION ALL CONCUR

RAYMOND J CANNON CLERK COURT OF APPEALS ALBANY.

SUP

LIBRARY
SUPREME COURT, U. S.

FILED
OCT 10 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 515

LOUIS KAYE,

Petitioner,

—v.—

CO-ORDINATING COMMITTEE ON DISCIPLINE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE NEW YORK COUNTY LAWYERS' ASSOCIATION, AND BRONX COUNTY BAR ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION

ANGELO T. COMETA
36 West 44th Street
New York, New York 10036
Attorney for Respondents

INDEX

PAGE

Statement of the Case 1

ARGUMENT:

POINT I

Petitioner was accorded his full rights under the Fifth Amendment 4

(a) The charges of misconduct are sustained by evidence independent of petitioner's testimony and documents produced by him 4

(b) Petitioner's attempt to redefine and extend the scope of the Fifth Amendment is invalid 5

POINT II

Petitioner's Fourth Amendment rights were not violated 11

POINT III

Petitioner was not deprived of his rights under the due process clause of the Fourteenth Amendment 14

CONCLUSION 16

INDEX TO CITATIONS

Cases:

Boyd v. United States, 116 U. S. 616 8

Burdeau v. McDowell, 256 U. S. 465 ..... 13, 14

PAGE

Elkins v. United States, 364 U. S. 206 14

Gardner v. Broderick, 392 U. S. 273 9
Garrity v. New Jersey, 385 U. S. 493 8
Application of Gault, 387 U. S. 1 7

Kaufman v. The Association of the Bar of the City of New York, 25 A. D. 2d 48, cert. denied, 389 U. S. 1048 10
Matter of Kaye, 24 A. D. 2d 345 2
Kaye v. Co-ordinating Committee, 386 U. S. 17 2

Mapp v. Ohio, 367 U. S. 643 14
Murphy v. Waterfront Commission, 378 U. S. 52 7

One 1958 Plymouth Sedan v. Pennsylvania, 380 U. S. 693 8

People v. Horman, Court of Appeals of the State of New York, decided July 1, 1968, New York Law Journal, September 18, 1968, p. 1 13

Matter of Rouss, 221 N. Y. 81 ..... 7, 10, 11
Matter of Ruffalo, 390 U. S. 544 16

Sackler v. Sackler, 15 N. Y. 2d 40 13
Spevack v. Klein, 385 U. S. 511 ..... 2, 3, 5, 6, 7, 8, 9, 12, 15

Ungar v. The Association of the Bar of the City of New York, 27 A. D. 2d 925, cert. denied, 385 U. S. 1006 10
Uniformed Sanitation Men Association Inc. v. Commissioner of Sanitation, 392 U. S. 280 9

Ex Parte Wall, 107 U. S. 265 8

Matter of Zuckerman, 20 N. Y. 2d 430, cert. denied, 390 U. S. 925 9

PAGE

Statutes, Rules, and Constitutional Provisions:

Constitution of the United States

Amendment IV 11, 12, 13, 14
Amendment V 2, 4, 5, 6, 9, 10, 12, 13, 14, 15
Amendment XIV 14, 15-16

New York Judiciary Law Section 90 2

Revised Rules of the Supreme Court of the United States, Rule 8 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 515

LOUIS KAYE,

Petitioner,

—v.—

CO-ORDINATING COMMITTEE ON DISCIPLINE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE NEW YORK COUNTY LAWYERS' ASSOCIATION, AND BRONX COUNTY BAR ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION

Statement of the Case

This is a petition for a writ of certiorari to review the order of the Court of Appeals of the State of New York entered on June 14, 1968, affirming the order of the Supreme Court of the State of New York, Appellate Division, First Department ("the Appellate Division"), dated December 5, 1967, disbarring petitioner from the practice of law.

The original disciplinary proceeding against petitioner, was brought pursuant to Judiciary Law, §90(2). On January 13, 1966, the petitioner was disbarred by order of the Appellate Division upon a finding that charges preferred against him by respondents, members of the Co-ordinating Committee on Discipline ("the Committee"), had been sustained. *Matter of Kaye,* 24 A. D. 2d 345. The evidence relied upon by the Appellate Division consisted of documents which petitioner had produced pursuant to subpoena, his testimony before the Committee in the course of its preliminary inquiry, and independent evidence adduced by respondents without reliance upon any documents made available by petitioner or testimony given by him.

Soon after entry of the order of disbarment of January 13, 1966, petitioner moved for leave to appeal to the Court of Appeals and for a stay, contending that the introduction before the Referee of his testimony adduced in the course of the Committee's preliminary investigation, was a violation of his rights under the Fifth Amendment. Petitioner further contended that respondents' investigation had its genesis in certain papers and records which were allegedly stolen from his apartment in violation of his Fourth Amendment rights. Petitioner's motions for leave to appeal and a stay were respectively denied by the Court of Appeals, 17 N. Y. 2d 422 and 17 N. Y. 2d 731. Thereafter, this Court vacated the order of disbarment and remanded the case "for reconsideration in the light of *Spevack* v. *Klein,* 385 U. S. 511." *Kaye* v. *Co-ordinating Committee,* 386 U. S. 17.

Pursuant to the Supreme Court's mandate of March 10, 1967, respondents moved in the Appellate Division for an order sustaining certain of the charges against petitioner

upon a re-examination of that portion of the trial record not affected by the *Spevack* decision. Respondents urged that the Appellate Division review the record to determine whether there was independent evidence sufficient to sustain the charges, without reliance upon petitioner's testimony and documents produced by him pursuant to subpoena. Petitioner served respondents with a notice of cross-motion which sought, among other forms of relief, an order directing respondents to "strictly comply with the [Supreme Court] mandate issued on March 10, 1967" and for an order of "re-reference to hear this matter *de novo*."

By order of December 5, 1967, the Appellate Division disbarred petitioner, its companion opinion noting: "Examination of the record reveals that there is sufficient [evidence] without respondent's testimony to sustain charges 1, 2, 3 as modified by eliminating the Finegold specification, 4, 5, 6, 8 and 9." On June 14, 1968, the Court of Appeals affirmed the Appellate Division's order of December 5, 1967.

ARGUMENT

I.

Petitioner was accorded his full rights under the Fifth Amendment.

(a) ***The charges of misconduct are sustained by evidence independent of petitioner's testimony and documents produced by him.***

The petitioner contends that he was denied the protection of the Fifth Amendment in the disciplinary proceedings below. The record before this Court does not support this assertion. The order of disbarment which was entered on December 5, 1967 resulted from a reconsideration of the evidence of petitioner's misconduct without reliance upon his testimony and documents produced by him in the course of respondents' inquiry.

Petitioner chooses to ignore the massive evidence of his professional misconduct—evidence which is in no way dependent upon his previous cooperation with the Committee. As an example, the following independent evidence fully supports three of the charges sustained by the Court:

(1) Petitioner was found to have "farmed out" his negligence cases to other attorneys without regard to the Canons of Professional Ethics and the Special Rules of the Appellate Division. In support of this charge, respondents adduced the testimony of five attorneys with whom petitioner negotiated these case-forwarding, cash transactions, together with the testimony of petitioner's general office employees.

(2) The conversion of a client's funds is sustained by the testimony of the client herself.

(3) Petitioner's harboring a disbarred lawyer in his law office is clearly proved by the testimony of the ex-attorney and petitioner's former secretary.

The Appellate Division was thus able to discipline petitioner without reaching any constitutional issues. Contrary to petitioner's theory, the Court below found that the record herein was not completely permeated by the "taint of . . . coerced evidence," but rather that the constitutional issues were separable from the independent grounds for disbarment. Accordingly the order which struck petitioner's name from the roll of attorneys was entered without reliance upon questionable evidence. This then is the meaning of the Appellate Division's statement that the constitutional principles "had no controlling application."

In addition, petitioner urges that by sustaining the Referee's report, the Appellate Division acted in violation of his constitutional rights. Put in its proper perspective, this argument is nothing more than a technical ploy totally without merit. It is obvious from the language of its opinion and from the record before this Court, that the Appellate Division, in confirming the Referee's *ultimate finding* that charges had been sustained, did not rely upon those portions of the record affected by the *Spevack* decision and violative of petitioner's rights under the Fifth Amendment.

(b) *Petitioner's attempt to redefine and extend the scope of the Fifth Amendment is invalid.*

Petitioner, aware of the wealth of evidence adduced against him through the testimony of others, goes on to attack the nature of a disciplinary proceeding vis-à-vis the protection afforded by the Fifth Amendment. The Fifth

Amendment to the Constitution of the United States provides in part that "no person . . . shall be compelled in any criminal case to be a witness against himself." Petitioner argues for an expansion of the term "criminal case" as used in the Fifth Amendment to include disciplinary proceedings. There is no merit in his contention and the authority which he cites to support his argument in no way warrants the conclusion he thrusts upon this Court.

An analysis of *Spevack* v. *Klein, supra,* makes it very clear that this Court did not change the law defining the scope of disclosure against which the privilege protects. Indeed, the language of the majority opinion in *Spevack* discloses no intent on the Court's part to expand the privilege to include disciplinary proceedings. When Mr. Justice Douglas stated: "The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood, are powerful forms of compulsion to make a lawyer relinquish the privilege," he was speaking in the conventional sense of the constitutional privilege against self incrimination.

Obviously, then, the Supreme Court did not reverse the order of disbarment in *Spevack* because the attorney had the right to refuse to answer questions which might tend to subject him to professional discipline. Such questions are clearly outside the scope of the privilege. Rather, the Court based its reversal upon a finding that disbarment was an improper form of compulsion to force the attorney to abandon his right not to answer questions which might tend to incriminate him in the conventional sense, that is, subject him to criminal prosecution.

In the context of petitioner's contention, the nature of a disciplinary proceeding is nowhere stated more clearly

than in *Matter of Rouss*, 221 N. Y. 81, in which Judge Cardozo spoke for a unanimous New York State Court of Appeals:

> A proceeding looking to disbarment is not a criminal case. We do not suggest that the witness is protected by the Constitution only when testifying in the criminal courts. The law is settled to the contrary. But to bring him within the protection of the Constitution, the disclosure asked of him must expose him to punishment for crime . . .

The *Spevack* holding is directed solely to the *type of proceeding* in which the privilege protects against self-incriminating disclosures; it does not alter or expand the type of disclosure which is protected against. This distinction, implicit in *Spevack*, is made explicit in *Application of Gault*, 387 U. S. 1:

> . . . the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.

Justice Fortas, writing for the majority in *Gault*, then goes on to adopt the precise language in which the scope of the privilege was defined in Justice White's concurring opinion in *Murphy* v. *Waterfront Commission*, 378 U. S. 52:

> . . . it protects any disclosures which the witness may reasonably apprehend could be used in a *criminal prosecution* or which could lead to other evidence that might be so used. [278 U. S. at 94, quoted with approval, 87 S. Ct. at 1454 (emphasis supplied)].

Nor can petitioner rely upon a related case, *Garrity* v. *New Jersey*, 385 U. S. 493, decided on the same day as *Spevack*. In *Garrity*, the Court prohibited the use of testimony by the prosecution at a *criminal trial* acquired by compulsion of threat of loss of job upon refusal to answer for any reason. The Court concluded that the testimony elicited and sought to be used in support of criminal charges against the defendants had been improperly compelled. Thus it can readily be seen that the Court was not expanding the scope of the privilege but rather addressed itself to the effect of state conduct as constituting improper compulsion exerted upon an individual in order to force him to waive his existing privilege against self-incrimination in the *conventional sense*.

Petitioner's reliance upon *Boyd* v. *United States*, 116 U. S. 616 and *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693 is equally misplaced. As this Court noted in *Plymouth Sedan*, the *Boyd* situation required a determination that the criminal law had been violated, the forfeiture there sought being authorized as an alternative to imprisonment and/or fine in the same statute. Consequently, if the claimant there were compelled to give testimony, he would be asked to provide evidence to establish a violation of what this Court concluded was essentially a criminal statute.

This Court has held that disciplinary proceedings are civil rather than criminal in nature, *Ex Parte Wall*, 107 U. S. 265, 288. Its rules concerning the discipline of attorneys admitted to its Bar have been predicated upon that assumption. Thus, where it is shown to this Court that any member of its Bar has been guilty of misconduct, he is forthwith suspended from practice and thereupon offered

the opportunity to show good cause why he should not be disbarred (Revised Rule 8). Contrary to the procedure applicable to criminal cases, the "accused" is thereby required to come forward to explain his conduct.

The opinion of the Court of Appeals of the State of New York is particularly significant in *Matter of Zuckerman*, 20 N. Y. 2d 430, 438-439, cert. denied, 390 U. S. 925 (after respondents were disciplined upon remand for reconsideration in the light of *Spevack*):

> The evidence which these appellants produced before the Referee cannot be used against them in any criminal proceeding. They had no privilege against making disclosure usable only in a disciplinary proceeding. The constitutional privilege applies only in the case of evidence which might be used against them in a criminal case under the language of the Fifth Amendment. Haber and Zuckerman may have thought that unless they produced this evidence they would be disbarred under *Cohen* v. *Hurley*, but neither [*Garrity* v. *New Jersey*, 385 U. S. 493 (1967)] nor *Spevack* confers upon them a constitutional privilege to withhold evidence which cannot lead to criminal prosecution and bears only upon their right to continue to practice law.

Two recent cases make petitioner's position even more untenable. In *Gardner* v. *Broderick*, 392 U. S. 273 and *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation*, 392 U. S. 280, the Court made it clear that appellants could have been dismissed from their public positions for failure to answer questions relating to performance of their official duties so long as they were not required to relinquish the protection afforded to them under the Fifth Amendment.

Adoption of petitioner's contention that disciplinary proceedings are criminal in nature could lead to intolerable situations within the framework of the Bar's traditional self-policing machinery. An analysis of *Matter of Rouss, supra,* points up the problem. In that case, Rouss, an attorney, had been called as a witness in the criminal trial of another, during which he was granted statutory immunity. Thereafter, the testimony given under immunity from criminal prosecution was introduced in a disciplinary proceeding. Upon disbarment, Rouss appealed, urging that the immunity from prosecution he acquired by testifying barred the use of his testimony not only in a criminal case, but in a disciplinary proceeding as well.

Adoption of Rouss' contention, as well as that of petitioner herein, would mean that a grant of immunity to an attorney in a criminal prosecution would deprive the Appellate Division of its right to supervise and regulate the conduct of lawyers. Thus, for example, an attorney who admitted giving bribes to a state official might continue to practice law before the very agency whom he sought to corrupt. A result as preposterous as this finds no support in the Constitution nor in this Court's opinion. Indeed, this Court has refused to entertain the notion that a disciplinary proceeding falls within the meaning of "a criminal case" for purposes of Fifth Amendment application. *Kaufman* v. *The Association of the Bar of the City of New York,* 25 A. D. 2d 48, cert. denied, 389 U. S. 1048; *Ungar* v. *The Association of the Bar of the City of New York,* 27 A. D. 2d 925, cert. denied, 385 U. S. 1006.

Respondents respectfully urge that the adoption of petitioner's proposed interpretation of the Fifth Amendment would lead to a condition never intended by the authors

of the Constitution and so well phrased by Judge Cardozo in *Matter of Rouss, supra*:

> Consequences cannot alter statutes, but may help to fix their meaning. Statutes must be so construed, if possible, that absurdity and mischief may be avoided. The claim of immunity from disbarment cannot survive the application of that test. If the exemption protects lawyers, it must equally protect physicians, whose licenses have long been subject to revocation for misconduct (citing statutes and cases). Two great and honorable professions have in that view been denied the right to purify their membership and vindicate their honor. The charlatan and rogue may assume to heal the sick. The knave and criminal may pose as a minister of justice. Such things cannot have been intended, and will not be allowed.

II.

Petitioner's Fourth Amendment rights were not violated.

The disciplinary inquiry below was initiated as a result of a complaint received by the Grievance Committee of the Association of the Bar of the City of New York from one Abraham Gelman, an attorney formerly associated with petitioner. Upon review of the complaint forwarded to respondents by the Grievance Committee, it was decided that the matter warranted further investigation. Accordingly, respondents began a review of petitioner's personal injury practice with a view to determining how petitioner obtained retainers in negligence actions, how such claims were prosecuted and in what manner settlement monies were distributed.

In the course of their investigation, respondents questioned 15 witnesses, including 7 attorneys who had dealt with petitioner on prior occasions. The remaining 8 witnesses included former clients of petitioner. During these preliminary hearings, the files of the attorney-witnesses and of various insurance companies were marked for identification together with copies of statements of retainer and closing statements filed with the Judicial Conference of the State of New York. This is the evidence which respondents produced in support of their application for the imposition of discipline upon petitioner, and which resulted in the Appellate Division's order of December 5, 1967.

At the outset, petitioner charged that the disciplinary inquiry was based upon information obtained from his files. The record before this Court disproves petitioner's contention. Rather than submit proof to support his allegation that the Committee was the beneficiary of stolen records, petitioner has contented himself with a constant reiteration of the charge, unsupported by any evidence whatsoever. The courts below have found no merit in this irrelevant issue, manufactured only to becloud a legitimate inquiry into petitioner's professional fitness.

On his first appeal to this Court, petitioner urged two principal theories, both of which he renews in the instant application: his rights under the Fifth Amendment were violated; and he was the victim of an "unlawful search and seizure" violative of his Fourth Amendment rights. In vacating the Appellate Division's first order of disbarment, this Court relied on the *Spevack* doctrine, which is based entirely on Fifth Amendment considerations. It is absurd to urge—as petitioner's logical position must be here—that the Supreme Court remanded for reconsideration in the light of *Spevack* if this same Court was per-

snaded that the Committee had based its case upon tainted evidence which would necessarily and ultimately require a dismissal of the entire proceeding. Thus, in reversing on Fifth Amendment grounds, this Court implicitly held that no Fourth Amendment right was violated.

Assuming, *arguendo,* that petitioner's files were stolen by a former associate of his, the Committee's use of such files would not have been improper. In *Burdeau* v. *McDowell,* 256 U. S. 465, this Court held that the government had a right to use stolen documents as evidence in a criminal prosecution against their owner. In reaching this conclusion the Court stated:

> The Fourth Amendment gives protection against unlawful searches and seizures, and . . . its protection applies to governmental action . . . it was intended as a restraint upon the activities of sovereign authority and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.

In New York, it has long been settled that the constitutional and statutory prohibitions against unlawful searches and seizures require the exclusion of evidence unlawfully gathered by state officers only. In both civil and criminal prosecutions, it has been held that the Fourth Amendment protections have not been applied where information had been wrongfully obtained by private individuals as distinguished from government officers and agents. *Sackler* v. *Sackler,* 15 N. Y. 2d 40; *People* v. *Horman,* Court of

Appeals of the State of New York, decided July 1, 1968, New York Law Journal, 9/18/68, p. 1.

Neither *Elkins* v. *United States*, 364 U. S. 206, nor *Mapp* v. *Ohio*, 367 U. S. 643, disturb the *Burdeau* doctrine. In *Elkins*, evidence was excluded in a criminal case since it was the product of an unlawful seizure by state officers and thus was found to be inadmissible in a federal court by virtue of violations of both the Fourth and Fourteenth Amendments. *Mapp* held that state courts must also exclude evidence seized in violation of the Federal Constitution, i.e., by state officials rather than private citizens.

By any standard, petitioner's argument must fail. He has not only failed to prove that the evidence in this case was unlawfully seized with the participation or knowledge of any governmental official. He has also failed to prove the fact of an unlawful seizure.

III.

Petitioner was not deprived of his rights under the due process clause of the Fourteenth Amendment.

This third ground upon which petitioner seeks certiorari is no more than a reiteration of his first two contentions based upon the Fourth and Fifth Amendments. Standing alone, neither petitioner's self-incrimination argument nor his search and seizure theory has sufficient merit to warrant this Court's review and they gain no merit by their combination.

Contrary to petitioner's assertion, the allegations of "extortion" and "stolen documents" are not issues here, since no evidence was adduced to support either charge. The

circumstances leading to the initiation of the disciplinary inquiry have been recited in detail (II, *supra*).

There was nothing perfunctory about the manner in which the Appellate Division reconsidered the evidence. The Committee moved to sustain the charges against petitioner and to impose discipline on the basis of a re-examination of that portion of the record not affected by *Spevack*. Therefore, it cannot be argued successfully that testimony elicited from petitioner was used in the Appellate Division's recon deration of the case after remand, since, in concluding that a second disbarment order should issue, the Court below disregarded all evidence, both testimonial and documentary, supplied by petitioner.

Petitioner's posture throughout the proceedings below makes his argument that he was entitled to a new trial on remand, preposterous on its face. Having successfully contended in this Court that his rights under the Fifth Amendment were violated by the use of his testimony earlier in the proceedings, he now seeks a hearing "which would permit complete eradication of the contamination of the prior proceedings" (p. 17, Pet. Brief). It must be assumed that he would testify at such a hearing although he does not express his intention in the present application. (Below, petitioner sought an opportunity to testify so that he might rectify "his poorly advised refusal to testify before the Referee."). The privilege against self-incrimination is one which cannot be so casually turned on and off. If petitioner's hearing *de novo* were to be realized, he would either return and give the same testimony which he originally gave, thus making the second trial a meaningless charade; or he would give different and necessarily perjured testimony.

Petitioner's assertion that the proceedings below violated the fundamental fairness requirement of the Fourteenth Amendment is without merit. Measured by this Court's standard as set forth in *Matter of Ruffalo*, 390 U. S. 544, it is obvious that petitioner was never denied his right to procedural due process. He was given written notice of the investigation and was served with a petition which detailed each charge and specification. He was represented by counsel throughout, confronted the witnesses who testified on respondents' behalf, and cross examined these witnesses vigorously. Thus he had ample opportunity to meet every charge and did in fact do so.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: October 9, 1968.

Respectfully submitted,

ANGELO T. COMETA
36 West 44th Street
New York, New York 10036
Attorney for Respondents